

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 33 of 1993

HON'BLE MR.JUSTICE K.S.JHAVERI

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO
2. To be referred to the Reporter or not? : NO
3. Whether Their Lordships wish to see the fair copy of the judgement? : NO
4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO
5. Whether it is to be circulated to the concerned Magistrate/Magistrates, Judge/Judges, Tribunal/Tribunals? : NO

A K SITULE

Versus

STATE OF GUJARAT

Appearance:

1. Special Civil Application No. 33 of 1993
MR YN OZA for Petitioner No. 1-6
MR PRADIP BHATE A.G.P. for Respondent No. 1-3
MR MR ANAND for Respondent No. 3,5,5-8-8
MR AMIT M PANCHAL for Respondent No. 4,4

CORAM : HON'BLE MR.JUSTICE K.S.JHAVERI

Date of decision: 11/08/2004

ORAL JUDGEMENT

1.0 In this petition the petitioners have prayed for a direction to the respondent nos.1 and 2 to consider the case of the petitioners for promotion to

the post of Ex-Cadre DSP/DCP on the basis that the petitioners are seniors to respondents no.3 to 8 and to grant them seniority from the date of their actual appointment on the post of Deputy Superintendent of Police.

2.0 The petitioners are working as Deputy Superintendent of Police, which is Class I Gazetted post. The petitioners No.1 to 3 were promoted to the said post in January 1985, petitioners no.4 and 5 were promoted to the said post in June 1985 and petitioner no.6 was promoted to the said post in January 1986.

2.1 The respondents no.3 to 8 herein are direct recruits to the post of Deputy Superintendent of Police. They have been selected by Gujarat Public Service Commission and they have joined the service in the year 1986.

2.2 According to the petitioners, the respondent authorities published a provisional seniority list on 19.1.1991. In the said provisional seniority list the names of promotees have been shown upto serial no.75 and thereafter none of the promotees have been shown and from serial number 76 onwards they have shown the direct recruits upto serial no.81. One of the petitioners has filed his objection against the said provisional seniority list on 1.2.1991. As per the contention of the petitioners, they have also filed objections against the said provisional seniority list, but no details are mentioned in the petition.

2.3 The respondent authorities rejected the objection and copy of the same is annexed to the petition. The reasons given by the respondent authorities for rejection of the objection is that the respondents no.3 to 8 are direct recruits and appointed against their quota and that the petitioners were not on the unconditional list in the year 1985. It is under the aforesaid circumstances the petitioners have moved this Court for the aforesaid relief.

3.0 The contentions on behalf of the petitioners can be summarised as under:

[a] That when the petitioners were promoted to the post of Deputy Superintendent of Police, the respondents no.3 to 8 were not born in the department and in the cadre of DSP/DCP and therefore there was no question of considering the respondents no.3 to 8 as seniors to the

petitioners.

[b] That though the quota rule was broken and appointments were made in excess of the quota, the appointments are made as per the statutory recruitment rules and therefore the seniority of the petitioners should not be disturbed.

[c] That the question of pushing up and pushing down would arise between the promotees and direct recruits only if on the date of promotion of the promotees i.e. the petitioners herein, the direct recruits were born in the cadre.

[d] That while considering the cases of the respondents no.3 to 8 for promotion to the post of DSP/DCP adjustments could have been made on the basis of rota and quota.

2.4 Learned counsel for the petitioner has drawn my attention to the Affidavit in rejoinder filed in the matter (page 59) wherein in para 4 it is stated as under:

"4. The most important aspect which has been overlooked by the respondents Nos.1 and 2 in considering the case of respondents nos.3 to 8 is their own guidelines. As per their own guidelines unless an officer has completed eight years' service as Deputy Superintendent of Police, his case cannot be considered for appointment by way of promotion to the post of Ex-Cadre District Superintendent of Police. In the instant case, the respondent Nos.3 to 8 were appointed in June 1986 and their probation period was over after two years, that is, they were appointed as regular Deputy Superintendent of Police only in June 1988 and, therefore, none of them have completed eight years' service as Deputy Superintendent of Police. It is most respectfully submitted that as per the latest judgement delivered by the Constitution Bench of the Hon'ble Supreme Court, if the quota rule has been broken and any appointment has been made in excess of quota but according to the rules of recruitment, the seniority should be reckoned from the date of appointment and the appointee cannot be pushed down below the appointees inducted at later date."

3.1 In view of the above submissions, learned counsel for the petitioners submitted that the petition deserves to be allowed and the case of the petitioners should be considered for promotion to the post of Ex-Cadre DSP/DCP on the basis that the petitioners are seniors to respondents no.3 to 8.

4.0 Mr.P.D. Bhate, learned A.G.P. for respondents no.1 and 2 has vehemently opposed the contentions raised on behalf of the petitioners. Affidavit in reply has been filed on behalf of the respondents no.1 and 2 and pointed out that the provisional seniority list was in order and only petitioner no.4 had objected to the said seniority list. The objection of petitioner no.4 was considered and rejected by the respondent authorities and petitioner no.4 has not challenged the said decision. According to the respondent authorities, other petitioners have not even filed objections to the said provisional seniority list.

4.1 Mr. Rawal for the respondents no.3 to 8 has adopted the arguments of Mr.Bhate and submitted that the petition requires to be dismissed.

5.0 I have heard the learned Advocates for the respective parties at length and perused the relevant documentary evidence on record. The facts emerging from the record as under:

6.0 A provisional seniority list of Deputy Superintendent of Police showing their position as on 1.1.1987 was published on 11.1.1991. While publishing the said seniority list the respondent authorities invited objections from the concerned Deputy Superintendents of Police and each and every officer was sent a copy of the said provisional seniority list through respondent no.2.

6.1 In the said seniority list names of the petitioners were not mentioned. However, except petitioner no.4, no petitioner had filed objection against the said provisional seniority list. After considering the objections against the said provisional seniority list respondent no.1 finalised the same and finally published the seniority list on 31.3.1992. A copy of the final list was also sent to each and every officer working in the cadre of Deputy Superintendents of Police through respondent no.2.

7.0 According to the respondent authorities, the names of the petitioners have been rightly not included in the aforesaid seniority list. Though except petitioner no. 6 all the petitioners were appointed in the cadre of Deputy Superintendents of Police prior to 1.1.1987, except petitioner no. 4 nobody has filed their objection. Since no objection was filed, the other petitioners cannot be heard to say that their rights were violated.

7.1 It was clearly stated in para 5 of the Circular dated 11.1.1991 annexed to the Seniority list that grievance with regard to the position in the seniority list should be ventilated before respondent no.1 within a period of 30 days from the date of publication of the said provisional list. The objection of the petitioner no.4 was duly turned down for the reason that he was a promotee Deputy Superintendent of Police whereas, Shri V.J. Gautam was a direct recruitee.

8.0 Now coming to the point of ratio vis-a-vis direct recruits and promotees, such ratio has been fixed by the Government. The appointments are to be made in the ratio of 1:2 i.e. for every 3 appointments in the cadre of Deputy Superintendent of Police, 1 should be appointed directly and 2 should be appointed by promotion from the cadre of Police Inspector.

8.1 The respondent authority could not have appointed promotees in the cadre of Deputy Superintendent of Police in excess of the quota prescribed under the recruitment rules, which are framed under proviso 2, Article 309 of the Constitution of India. From the record it is clear that promotees were appointed in excess of their quota. According to the respondent authorities, ordinarily the quota rule should be followed by the Government while giving appointment in any cadre, but due to administrative exigencies the respondent authorities were constrained to appoint more promotees in the cadre of Deputy Superintendent of Police in the past. From 1980 to 1985 no direct recruitment in the cadre of Deputy Superintendent of Police had been taken place though requisitions were sent to G.P.S.C. Therefore, in order to see that the posts in the cadre of Deputy Superintendent of Police did not remain vacant, for administrative exigencies, the petitioners and several other persons were appointed in the cadre of Deputy Superintendent of Police by even exceeding the quota of

promotees. It is, therefore, quite possible that if the direct recruits were appointed earlier, the petitioners would not have been promoted at all.

8.1 Subsequently in the year 1986 direct recruits were appointed in the cadre of Deputy Superintendent of Police. It is under those circumstances, in order to maintain the ratio of direct recruits and promotees, the promotees had to be pushed down as per settled legal provisions and Government Resolution dated 4.12.1986. Therefore, as the petitioners have been pushed down, they have not been shown in the seniority list of Deputy Superintendent of Police showing their position as on 1.1.1987.

9.0 Thus, the crux of the matter is that since the recruitment of direct recruits were delayed, the Government was constrained to appoint more promotees in the cadre of Deputy Superintendent of Police as a result of which the promotees were appointed in excess of their quota. Therefore, even the petitioners were appointed in the cadre of Deputy Superintendent of Police by even exceeding the quota of promotees. Therefore, when the direct recruits were appointed in the cadre of Deputy Superintendent of Police, they were duty bound to maintain the ratio of direct recruits and promotees. Therefore, to strike the balance the promotee, who were appointed by even exceeding the quota of promotees, had to be pushed down according to the law and Government Resolution dated 4.12.1986. Therefore, I do not find anything illegal in the action of the respondent authorities. Merely, because the petitioners were appointed prior to the recruits by exceeding the quota of promotees, they cannot claim over the seniority of direct recruits. It is always open for the respondent authorities to push down promotees to maintain the ratio fixed by the Government. Moreover, if the case of the petitioners is accepted, and they are given seniority over the direct recruits, then the gap would widen further which would cause serious prejudice to the direct recruits, which cannot be allowed.

10.0 Learned counsel for the petitioner relied upon a decision of the Supreme Court in the case of Direct Recruit Class II Engineering Officers' Association Vs. State of Maharashtra and others, reported in (1990)2 SCC 715. In the said decision it is held that where quota rule broke down and appointments made from one source (promotion in that case) in excess of quota in public interest and in accordance with rules, seniority

of such appointees (promotees) to be reckoned from the date of such appointments and not from the date when vacancy within the quota became available. Such appointees cannot be pushed down below the appointees drawn from the other source (direct recruits) at a later point of time.

11.0 Learned counsel for the respondents relied upon a decision of the Supreme Court in the case of Jaisinghani Vs. Union of India wherein it is held that Quota rule of promotion laid down in letter of Government of India dated 18.10.51 is a statutory rule and the duty is cast on the Government to determine method or methods to be employed for the purpose of filling vacancies and number of candidates to be recruited by each method. Promotions of Departmental Officers made in contravention of quota rule is held to be illegal. It was further held that promotion or appointment to a service from two sources, reasonable classification of employees for the purposes of appointment or promotion is permissible.

11.1 Learned counsel for the respondents relied upon a decision of the Supreme Court in the case of Keshav Chandra Joshi Vs. Union of India, reported in 1992 Supp (1) SCC 272. In the said decision it is held as under:

"It is true that Government had to make promotions in excess of quota but that itself does not give right to the petitioners to be included in the seniority list of Assistant Conservator of Forests. The prerequisite of the right to be included in the seniority list is that all those claiming right must broadly bear the same characteristics. Fortuitous circumstances of their holding the grade post carrying the same designation or scale of pay or discharging the same duty would not entitle them to be included in the service. Further, the criteria followed in ad hoc promotions was not the same as that for regular promotions. These promotions were therefore de hors Rule 5(b) read with Appendix B."

In para 24 of the said decision it is held as under:

"Seniority has to be reckoned from the date of initial appointment and not from confirmation but this holds good only if initial appointment is ad hoc or fortuitous. When the promotion is outside the quota, the seniority

has to be reckoned from the date of the vacancy within the quota, rendering the previous service fortuitous. The previous promotion would be regular only from the date of the vacancy which arose within quota and seniority is to be counted from that date and not from the date of his earlier promotion or subsequent confirmation. The rule of quota being a statutory one, it must be strictly implemented and it is impermissible for the authorities concerned to deviate from the rule due to administrative exigencies. However, where the promotees are appointed in excess, they have to be pushed down so that injustice to direct recruits is avoided."

11.2 Learned counsel for the respondents relied upon a decision of the Supreme Court in the case of C.K. Antony Vs. B. Muraleedharan, wherein it is held that the plea of the promotees that though their appointments were temporary, the Government has regularised those appointments prior to the appointments of the direct recruits and, therefore, they are not entitled to claim seniority over the direct recruits cannot be accepted. Factually, before the appointments of the direct recruits they were undergoing training as advised by the Kerala Public Service Commission and therefore, it cannot be contended by the State that no direct recruits were available for appointment, which necessitated the recruitment by transfer. Any appointment/regularisation contrary to the rules, which would prejudice the rights of direct recruits, cannot be sustained.

11.3 Learned counsel for the respondents relied upon a decision of the Supreme Court in the case of R.K. Sabharwal Vs. State of Punjab, reported in AIR 1995 SC 1371 wherein it is held that if the roster is permitted to operate till the total posts in a cadre are filled and thereafter the vacancies falling in the cadre are to be filled by the same category of persons whose retirement etc., caused the vacancies, then the balance between the reserve category and the general category shall always be maintained.

12.0 In view of the above discussion, there is no substance in the contention that when the petitioners were promoted to the post of Deputy Superintendent of Police, the respondent nos. 3 to 8 were not born in the department and in the cadre of DSP/DCP. Merely

because the Government had to make promotions in excess of quota, that itself would not give right to the petitioners to be included in the seniority list. The rule of quota being a statutory one, it must be strictly implemented and it is impermissible for the authorities concerned to deviate from the rule due to administrative exigencies. As per the settled law, where the promotees are appointed in excess, they have to be pushed down so that injustice to direct recruits is avoided.

12.1 Admittedly, the quota rule was broken and appointments were made in excess of the quota to maintain the ratio the respondent authorities have rightly fixed the seniority of the direct recruits and no fault can be found in such fixation.

12.2 Looking to the facts and circumstances of the case, pushing down was done only because of several persons including the petitioners were appointed in the cadre of Deputy Superintendent of Police by exceeding the quota of promotees. Therefore, no grievance can be made against such pushing down by the petitioners.

12.3 Moreover, while maintaining ratio between the direct recruits and promotees no adjustments can be made if the ratio is to be maintained in accordance with the rules and regulations.

12.4 Apart from that, even according to the petitioners, they do not claim promotion as a matter of right since the criteria for promotion is proved merit and efficiency.

13.0 Thus, looking to the overall facts and circumstances of the case, I do not find any substance in any of the contentions raised on behalf of the petitioners and the petition deserves to be rejected. Accordingly, the petition is rejected. Rule is discharged with no order as to costs.

[K.S. JHAVERI, J.]

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